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No. 88-1360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHANLEY & FISHER, P.C.
Attorneys for Respondent
Federal Insurance Company
One World Trade Center
Suite 5271
New York, New York 10048
(212) 321-1753

On the Petition:
WILLIAM G. BECKER, JR.
BRIAN F. MCDONOUGH

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STATEMENT OF INTERESTED PARTIES

Federal Insurance Company is a subsidiary of the Chubb Group of Insurance Companies, of which Chubb & Co., Inc. is the parent corporation.

STATEMENT OF THE CASE

This is a diversity action in which the courts applied New York law in determining the ranking of two excess insurance policies, both of which purported to be excess to any other insurance available to the insured. In holding that the two insurers should contribute ratably in proportion to the limit of their coverage, the District Court applied the well established rule that "mutual excess policies covering the same risk cancel each other out" [A-25] and that "each insurer is required to contribute ratably in such proportion as its policy limit bears to the total of all policy limits," *id.*, *unless* to do so would "distort the meaning of the terms of the policies involved." [A-26]. This determination is not made in a vacuum, but turns "on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it . . . as well as upon the wording of its provision concerning excess insurance." *Id.*

In concluding that these two policies were intended to contribute ratably, the District Court found that both of them insured the same risk, *i.e.*, the "ultimate net loss" in excess of the "retained limit."* Although each policy contained a schedule of primary or underlying insurance that it was supposed to be excess to, neither listed the other's excess policy as primary or underlying coverage. *Id.* "Plainly," the District Court found, "both companies are attempting to insure at an excess level only, *i.e.*, above primary and other coverage." *Id.*

This was manifested by their "Other Insurance" clauses, each of which provided that they would be excess to any other insurance available to the insured. "Undeniably," the District Court found, "both carriers contemplate a disbursement only at the highest (*i.e.* last) level of coverage and have attempted, by way of their similar phraseology, to render their coverage excess to

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* U.S. Fire defined the "retained limit" as consisting of all primary or underlying insurance listed in the policy, as well as any other insurance collectible by the insured. Similarly, Federal defined the "retained limit" as consisting of the insurance listed in its policy or any other insurance collectible by the insured, whichever is greater. [A-27].

all others." [A-29]. However, neither of the "virtually identical 'other insurance' clauses" contained any language "making its carrier, *i.e.*, plaintiff or defendant, excess over *all other excess* insurers covering the same risk (emphasis in original)" [A-29], though either could have done so. Accordingly, the District Court found that these mutually exclusive "Other Insurance" clauses cancelled each other out and directed the parties to contribute ratably to the settlement in proportion to their policy limits.

In the face of this unassailable similarity between the policies, U.S. Fire itself resorted to an extrinsic fact by attempting to single out one isolated phrase from the introductory message preceding the Federal policy. This phrase stated to the policyholder (not U.S. Fire) that it applied "after all your primary liability insurance has been used up" [A-27, 28]. On the basis of this introductory phrase preceding the actual policy, U.S. Fire argued that the Federal policy was intended to insure at a lower level. As the District Court correctly found, however, "this language is contained in a general introductory provision of the Federal insurance contract within a subsection entitled "Your Policy and You." Exh. 3 at 3-4. Significantly, defendant's precise coverage responsibilities are more elaborately and technically set forth in the "Policy" section (*Id.* at 5-15) which disclose a consistent intention on the part of Federal to contribute policy proceeds only after primary *and* other insurance has been exhausted." [A-27, 28]. Because the inferences to be drawn from this undisputed record remained in dispute, the Second Circuit applied the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) and affirmed the decision below.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

This case presented a narrow question of state insurance law that has no important ramifications for the insurance industry at large or the Federal Rules of Civil Procedure. The decision turned on a comparison of the language, purpose, and premium structure of two insurance policies. Under ordinary principles of collateral estoppel both parties already know how a court will construe their policies in the future and further review or clarification by this Court is unnecessary. Any conflict between these policies and another insurance policy would have to be decided on the specific facts presented regardless of whether the result below is characterized as a question of fact or a question of law.

Nor is there any division or confusion among the Circuits as a result of this Court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). While the Circuits have employed differing standards of review in a series of contract cases, this was the result of the different factual or legal questions presented in the cases themselves. All of the Circuits are in general agreement that the construction of unambiguous contractual language is a question of law as to which review is plenary. Where an ambiguity arises, however, and the parties' intention must be determined, a question of fact arises as to which the District Court's findings will not be reversed unless clearly erroneous under Fed. R. Civ. P. 52(a). In this case U.S. Fire attempted to create such an ambiguity by reaching beyond the text of Federal's policy to argue that a phrase in the introductory section undermined Federal's manifest intention to provide a final level of excess coverage beyond any other available insurance. Not only was the issue resolved squarely against U.S. Fire, but the result was soundly supported by the overall undisputed record below.

I

NO QUESTION OF IMPORTANCE HAS BEEN PRESENTED

In attempting to elevate this routine question of state insurance law into a substantial public question worthy of this Court's consideration, U.S. Fire suggests that itself and the entire insurance industry need to know how a court will construe the policies involved here. This case does not, however, involve the construction of any particular clause or contractual term of art which needs to be clarified for the benefit of the entire insurance industry. Rather, it involves a comparison of two particular policies to determine whether one was intended to be excess to the other.

It is disingenuous for U.S. Fire to claim that it merely seeks clarity, because the clarity U.S. Fire purports to seek is already supplied by the decision below. The Court's opinion, finding that the Federal and U.S. Fire policies cover the same risk at the same level and thereby cancel each other out, would have collateral estoppel effect in any future litigation involving a conflict between the same two policies. Because U.S. Fire and Federal already know "how a court will construe their policies" (U.S. Fire Brief at p. 11) in a future conflict between them, further elaboration is unnecessary.

Nor would characterization of this result as a pure question of law have provided any additional guidance for the entire insurance industry. The ranking of two excess insurance policies will necessarily vary depending on the respective provisions of the two policies, the language used, their premium structures, the risks covered, and whether either policy is identified by the other as being primary or underlying to it. Any dispute between a third insurer and either U.S. Fire or Federal would have to be resolved anew on its own facts, and treating the holding below as a question of law rather than fact will do little if anything to alleviate future litigation where different policies, with their own wording and structure, are involved.

II

THE CIRCUITS ARE NOT DIVIDED

U.S. Fire also attempts to elevate this into a major issue of civil procedure by arguing that this Court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) has unleashed a wave of division among the Circuits over the correct standard of review to be applied in appeals involving contract questions. Upon closer examination, however, the "division" proves to be nonexistent. The plethora of cases cited by U.S. Fire involved a widely disparate variety of factual or legal questions which warranted different standards of review based upon the different issues presented, not any confusion among the circuits.

In *RCI Northeast Services Div. v. Boston Edison Co.*, 822 F.2d 199 (lst Cir. 1987), the First Circuit did not hold that all questions of contract construction are matters of fact to be submitted to the finder. Only where there is an ambiguity to be resolved does a finding of fact become necessary, as the Court's holding makes clear:

> . . . where the plain meaning of a contract does not spring unambiguously from the page or from the context, its proper direction becomes one for the factfinder, who must ferret out the intent of the parties.

822 F.2d at 202. Similarly, in *Republic Resources Corporation v. ISI Petroleum West Caddo Drilling Program 1981*, 836 F.2d 462, 465 (10th Cir. 1987), the Tenth Circuit only applied the "clearly erroneous" standard after determining that an ambiguity existed necessitating an inquiry into the parties' intentions.

While U.S. Fire purports to find a conflict between the foregoing positions and that taken by the Fifth Circuit in *Godchaux v. Conveying Techniques Inc.*, 846 F.2d 306 (5th Cir. 1988), the conflict subsides upon a reading of *Godchaux*. In that case, the Fifth Circuit applied the "clearly erroneous" standard of Rule 52(a) in reviewing the district court's construction of the phrase "generally accepted accounting principles consistently applied" as they appeared in a warranty portion of a contract. In opting

for such a standard of review the Fifth Circuit formulated the applicable test as follows:

> Since the interpretation of a contract is a matter of law if the provisions of the contract are clear, we will review the district court's interpretation of this contract de novo if we determine that the terms of Godchaux's warranty are clear and unambiguous. . . . If, however, we determine that the terms of Godchaux's warranty are ambiguous after we search the four corners of the contract, then we will accept, unless clearly erroneous, the district court's findings of fact as to the intent of the parties. Fed. R. Civ. P. 52(a). (Citations omitted).

This is not inconsistent with the position of the Third Circuit, as expressed in *STV Engineering Inc. v. Greiner Engineering, Inc.*, 861 F.2d 784, 787 (3d Cir. 1988):

> To the extent, however, that the district judge's decision involves the construction of a clear contractual term, or the application of that construction, our review is plenary. [Citation omitted]. While the interpretation of an ambiguous contractual term is a matter for the factfinder, determining whether contractual terms are clear or ambiguous is a matter of law . . .

None of the other cases cited by U.S. Fire espouse a different rule. In sum, the Circuits are generally in agreement that the construction of clear and unambiguous contractual language is a question of law as to which review is plenary. Where an ambiguity exists, however, then a question of fact arises as to which the "clearly erroneous" standard applies.

In this case U.S. Fire labored to create an ambiguity by arguing that an isolated phrase in the introductory message – which was itself extrinsic to the actual policy – contradicted the unmistakable intent of the Federal policy to apply only after all other excess insurance had been exhausted. Having reached beyond the body of the policy in an effort to create an ambiguity, U.S. Fire can hardly be heard to complain that the Court's findings with respect to that purported ambiguity were reviewed under the "clearly erroneous" standard.

III

THE SECOND CIRCUIT APPLIED THE CORRECT STANDARD OF REVIEW AND THE RESULT IS CLEARLY SUPPORTED BY THE RECORD BELOW

Finally, the Second Circuit applied the correct standard of review to this case. This did not involve the construction of any unambiguous phrase or term of art, but a ranking of two separate policies – each extrinsic to the other – to determine whether the different parties "bargain[ed] for a ratable contribution with" the other. *Lumbermens Mutual Casualty Company v. Allstate Insurance Company*, 51 N.Y.2d 651, 435 N.Y.S.2d 935, 955, 417 N.E.2d 66 (1980). Because U.S. Fire attempted to create an ambiguity by reaching beyond the Federal policy to an allegedly inconsistent phrase contained in its extrinsic introductory message, this case is inapposite from such prior decisions of this Court as *Hamilton v. Liverpool & London & Glove Ins. Co.*, 136 U.S. 242, 255 (1980), which involved the interpretation of unambiguous commercial writings whose meaning was not in dispute.

Moreover, the result below was amply supported by additional evidence in the record. First, the very circumstances under which the policies were purchased negates U.S. Fire's argument that the parties or their policyholders intended one policy to be excess to the other. The Federal policy was purchased by John Bell individually, to provide excess insurance over and above, *inter alia*, his wife's personal automobile insurance policy. The U.S. Fire policy, by contrast, was purchased by the Boyle Company (of which John Bell was president) to provide excess coverage over and above, *inter alia*, a business automobile policy issued by Federal to the Boyle Company. Since these policies were purchased by separate policyholders, both to provide a second layer of coverage to their own insurance schemes, it would have been absurd to hold that Mr. Bell intended his personal excess policy to provide a lower level of coverage to the Boyle Company corporate policy, and the decision below was manifestly correct.

Second, U.S. Fire itself conceded that the policies were to apply concurrently in the proceedings below. In attempting to induce

Federal's participation in the settlement of the underlying action, U.S. Fire's trial witness Dan Miller had furnished an opinion (which was admitted into evidence without objection by U.S. Fire) from his present counsel's law firm to that effect that the policies applied concurrently. Hence any doubts on this issue had been resolved by U.S. Fire's own admission that the two policies applied concurrently. While it was not necessary for the District Court to specifically incorporate these additional facts into its opinion given the manifest overlap and similarity between the policies, they further establish the correctness of the result below and obviate any need for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

SHANLEY & FISHER, P.C.
Attorneys for Respondent
Federal Insurance Company
One World Trade Center
Suite 5271
New York, New York 10048
(212) 321-1753

On the Petition:
WILLIAM G. BECKER, JR.
BRIAN F. MCDONOUGH